**No. 16-2185**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FOURTH CIRCUIT**

CARLTON & HARRIS CHIROPRACTIC, INC.,

Plaintiff-Appellant,

v.

PDR NETWORK, LLC, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of West Virginia

# BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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## INTERESTS OF THE UNITED STATES

Plaintiff alleges that defendants violated a provision of the Telephone Consumer Protection Act of 1991 (TCPA) prohibiting the use of a fax machine to send an "unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). Plaintiff's position relies in part on a Federal Communications Commission (FCC) final order interpreting this provision. This Court previously held that defendants could not challenge the order's validity in these proceedings, explaining that the Administrative Orders Review Act (Hobbs Act) provides the exclusive avenue for judicial review of final FCC orders.

The Supreme Court granted certiorari and, after briefing and argument, remanded for consideration of two preliminary questions that might be germane to the disposition of the case: whether the FCC order is the equivalent of a legislative rule or an interpretive rule, and whether the Hobbs Act afforded defendants a "prior, adequate" opportunity for judicial review within the meaning of 5 U.S.C. § 703. *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055 (2019).

The United States participated as amicus curiae in the Supreme Court and does so here pursuant to Federal Rule of Appellate Procedure 29(a)(2) in order to preserve the integrity of the Hobbs Act scheme, which is designed

to permit judicial review on the basis of a fully developed administrative record with the participation of interested parties, including the federal agency responsible for issuing the rule, and to promote the uniform application of federal law.

## STATEMENT

### A. The Hobbs Act

The Hobbs Act gives the federal courts of appeals, other than the Federal Circuit, "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" certain agency actions, including "all final orders of the [FCC] made reviewable by section 402(a) of title 47." 28 U.S.C. § 2342(1); *see* 47 U.S.C. § 402(a). The Act also applies to certain actions of the Secretary of Agriculture, Secretary of Housing and Urban Development, Secretary of Interior, Secretary of Transportation, Board of Immigration Appeals, Federal Maritime Commission, Nuclear Regulatory Commission, and Surface Transportation Board. *See* 8 U.S.C. § 1252(a)(1); 28 U.S.C. § 2342(2)-(7); 50 U.S.C. § 167h(b); *see also* 42 U.S.C. § 5841(f).

"Any party aggrieved by" a final order covered by the statute "may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. § 2344. "The action shall be

against the United States," *id.*, and "the agency . . . may appear as [a] part[y] thereto . . . as of right," *id.* § 2348. In the event that multiple petitions seek review of a final agency order, the petitions are consolidated in a single court of appeals. *Id.* § 2112(a)(3).

"This procedural path created by the command of Congress 'promotes judicial efficiency, vests an appellate panel rather than a single district judge with the power of agency review, and allows uniform, nationwide interpretation of the federal statute by the centralized expert agency'" charged with overseeing the TCPA. *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014) (quoting *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010)). It also serves the important purpose of "ensur[ing] that the Attorney General has an opportunity to represent the interest of the Government whenever an order of one of the specified agencies is reviewed." *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70 (1970).

**B. The TCPA and Related Regulatory Proceedings**

The TCPA generally prohibits the use of a fax machine to send an "unsolicited advertisement." 47 U.S.C. § 227(b)(1)(C). The statute defines "unsolicited advertisement" to include "any material advertising the

commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission." *Id.* § 227(a)(5). The meaning of "unsolicited advertisement" is relevant not only to the fax rule outlined above but also to the scope of restrictions on artificial or prerecorded voice calls to residential phone lines, from which the Commission has exempted calls that do not include an advertisement. *Id.* § 227(b)(2)(B); 47 C.F.R. § 64.1200(a)(3)(ii)-(iii).

Congress vested the FCC with authority to "prescribe regulations to implement the requirements" of the TCPA. 47 U.S.C. § 227(b)(2). The statute's provisions are enforced by the federal government, *id.* §§ 501-503, and through certain private rights of action, *id.* § 227(b)(3) and (c)(5). Federal and state courts have concurrent jurisdiction over private TCPA lawsuits. *See Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 371-72 (2012).

In 2002, the FCC sought comment on the meaning of "unsolicited advertisement" as it applied to telephone calls offering "free" goods or services. 17 FCC Rcd. 17,459, 17,478 ¶ 31 (2002). The Commission observed that "while these calls do not purport to sell something," they "often contain messages advertising the quality of certain goods or services and are intended to generate future business." *Id.* (also noting that such

communications are generally "motivated in part by the desire to ultimately sell additional goods or services"). The FCC also sought comment on issues relating to unsolicited fax advertisements. *Id.* at 17,482-84 ¶¶ 37-40.

In July 2003, following extensive public comment, the FCC issued an order explaining that "[o]ffers for free goods or services that are part of an overall marketing campaign to sell property, goods, or services" constitute "unsolicited advertisement" under the TCPA. 18 FCC Rcd. 14,014, 14,097-98 ¶ 140 (2003). Although much of the agency's reasoning applies equally to the prohibition on unsolicited fax advertisements, the relevant portion of the FCC's 2003 order specifically addresses restrictions on automated calls.

Several entities filed petitions for clarification or reconsideration, including petitions that asked the Commission to address the application of the unsolicited advertisement prohibition to various fax communications. A petition filed by a healthcare publishing company urged that the prohibition should not apply to faxes offering free information about pharmaceutical products to pharmacists or free medical seminars to physicians.[1] Another

[1] Pet. for Recons., at 1, *Jobson Publ'g*, No. CG 02-278 (Aug. 25, 2003), https://www.fcc.gov/ecfs/filing/5509934940; *see* Pet. for Recons., *Coalition for Healthcare Commc'n*, No. CG 02-278 (Aug. 25, 2003), https://www.fcc.gov/ecfs/filing/5509935015 (similar).

petition asked for clarification that faxes offering "specialized trade or business publications provided at no charge" are not "unsolicited advertisements."[2]

The FCC issued a public notice seeking comment on all the petitions received. 68 Fed. Reg. 53,740, 53,740 (Sept. 12, 2003). Although the notice did not specify the subject matter of the various petitions apart from identifying the underlying order to which they related, the petitions were available for review via the FCC's Electronic Comment Filing System, *see* 17 FCC Rcd. at 17,501-02 ¶¶ 81-82. A number of parties submitted comments, *see* 21 FCC Rcd. 3787, 3836 (2006) (listing oppositions and replies), although none specifically addressed the issue presented here.

In 2006, the FCC issued a final order addressing the restrictions on unsolicited fax advertisements. 21 FCC Rcd. at 3788. A portion of the order "address[ed] certain issues raised in petitions for reconsideration of" the 2003 order. *Id.* at 3788 ¶ 1. As relevant here, the order concludes that "facsimile messages that promote goods or services even at no cost, such as

[2] Pet for Recons., at 3, *Proximity Mktg.*, No. CG 02-278 (Aug. 6, 2003), https://www.fcc.gov/ecfs/filing/5509535325; *see* Pet. for Recons., *American Bus. Media*, No. CG 02-278 (Aug. 25, 2003), https://www.fcc.gov/ecfs/filing/5509934906 (similar).

free magazine subscriptions, catalogs, or free consultations or seminars, are unsolicited advertisements under the TCPA's definition." *Id.* at 3814 ¶ 52. The Commission explained that "'free' publications are often part of an overall marketing campaign." Although "the publication itself may be offered at no cost to the facsimile recipient, the products promoted within the publication are often commercially available." *Id.* The FCC concluded that "such messages describe the 'quality of any property, goods, or services'" under the TCPA's definition of "unsolicited advertisement." *Id.* (quoting 47 U.S.C. § 227(a)(5)).

The FCC published a summary of this determination in the Federal Register. 71 Fed. Reg. 25,967, 25,973 (May 3, 2006). Two parties petitioned for judicial review of other portions of the order, and their challenges were dismissed on procedural grounds. *Biggerstaff v. FCC*, 511 F.3d 178, 186 (D.C. Cir. 2007).

### C. Factual and Procedural Background

**1.** Defendants in this suit are PDR Network, LLC, PDR Distribution LLC, PDR Equity, LLC, and ten unnamed individuals (collectively PDR Network). Defendants publish the *Physicians' Desk Reference*, a compendium of prescription-drug information. Manufacturers pay

defendants to have their drugs included in the reference, and defendants make the reference available to physicians and others free of charge. According to the complaint, PDR Network sent plaintiff Carlton & Harris Chiropractic, Inc., an unsolicited fax describing the benefits of the *Physicians' Desk Reference* and inviting plaintiff to request a free electronic copy of the publication.

Plaintiff filed suit, alleging that PDR Network violated the TCPA by sending an unsolicited fax advertisement. Plaintiff sought to represent a class consisting of itself and other entities that received the same fax.

Defendants moved to dismiss the complaint for failure to state a claim. They argued that the fax offering the free publication was not an unsolicited advertisement because it did not offer anything for sale. Plaintiff opposed, citing the interpretation in the 2006 FCC order and urging that, because the Hobbs Act vests the courts of appeals with exclusive jurisdiction to determine the validity of final FCC orders, the district court could not reject or ignore the FCC's interpretation.

The district court granted defendants' motion to dismiss. While the court agreed that the Hobbs Act precluded consideration of the order's validity, it concluded that the presumed validity of the order "does not, *ipso*

*facto*, bind the Court to defer to the FCC's interpretation of the TCPA." *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, No. 15-14887, 2016 WL 5799301, at *4 (S.D. W. Va. 2016). The court then analyzed the order under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *PDR Network*, 2016 WL 5799301, at *4. At step one of the *Chevron* analysis, the court held that the TCPA unambiguously defines "unsolicited advertisement" to refer to communications with a commercial aim. *Id.* Finding the statute unambiguous, the court concluded that the FCC's interpretation was not entitled to deference. *Id.* The court in any event construed the 2006 FCC order to be consistent with the statute, reading both to require a commercial aim. *Id.* The court determined that plaintiff had not alleged that the fax at issue had such an aim. *Id.* at *5.

**2.** This Court reversed. The Court observed that "[n]either party ha[d] disputed that the 2006 FCC Rule is the sort of 'final order' contemplated by the Hobbs Act." *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 883 F.3d 459, 464 n.1 (4th Cir. 2018). It then concluded that "[t]he district court erred when it eschewed the Hobbs Act's command in favor of *Chevron* analysis to decide whether to adopt the 2006 FCC Rule." *Id.* at 464. The Court rejected defendants' argument that the Hobbs Act did

not apply because "the district court did not specifically invalidate" the FCC's rule but "merely chose not to apply it," concluding that "[i]nvalidation by any other name still runs afoul of the Hobbs Act's constraints." *Id.* at 465. The Court also concluded that the 2006 order's "meaning is plain," *id.* at 466, and that the order articulates "this simple rule: faxes that offer free goods and services are advertisements under the TCPA," *id.* at 467.

Judge Thacker dissented, concluding that the district court did not exceed its jurisdiction under the Hobbs Act by undertaking a *Chevron* analysis in these circumstances. *PDR Network*, 883 F.3d at 469 (Thacker, J., dissenting). Applying *Chevron*, the dissent concluded that the TCPA is ambiguous as to whether an "advertisement" must have a commercial aim, and that the 2006 FCC order requires such a purpose. *Id.* at 472-73. Finding no allegation that the fax at issue had such an aim, the dissent would have held that plaintiff failed to state a claim. *Id.* at 474-75.

**3.** The Supreme Court granted certiorari, limited to the question whether the Hobbs Act required the district court to accept the FCC's interpretation of the TCPA. Following briefing and argument in which the United States participated as amicus curiae, the Supreme Court vacated and remanded for further proceedings. *PDR Network, LLC v. Carlton & Harris*

*Chiropractic, Inc.*, 139 S. Ct. 2051 (2019).

Noting that the parties "did not dispute below that the [FCC's] Order is a 'final order' that falls within the scope of the Hobbs Act," the Court "assume[d] without deciding that the Order is such a 'final order.'" *PDR Network*, 139 S. Ct. at 2055. The Court observed, however, that "the extent to which the Order binds the lower courts may depend on the resolution of two preliminary sets of questions that were not aired before the Court of Appeals": (1) whether the order is the equivalent of a legislative rule or an interpretive rule; and (2) whether the Hobbs Act procedures afforded PDR a "prior, adequate" opportunity for judicial review within the meaning of 5 U.S.C. § 703. *PDR Network*, 139 S. Ct. at 2055-56 (emphasis omitted).

Justice Thomas filed an opinion concurring in the judgment, in which Justice Gorsuch joined, stating that a judicial decision "[i]nterpreting a statute does not 'determine the validity' of an agency order interpreting or implementing the statute," and that "[a] contrary view would arguably render the Hobbs Act unconstitutional." *PDR Network*, 139 S. Ct. at 2056-57 (Thomas J., concurring in judgment). Justice Kavanaugh also filed an opinion concurring in the judgment, in which Justices Thomas, Alito, and Gorsuch joined, stating that he would have reached the question presented

and would have held "that the Hobbs Act does not bar a defendant in an enforcement action from arguing that the agency's interpretation of the statute is wrong." *Id.* at 2058 (Kavanaugh, J., concurring in judgment).

On remand, this Court directed the parties to submit supplemental briefs addressing the two questions raised by the Supreme Court, along with five other questions.

## ARGUMENT

### The Hobbs Act Precludes Defendants from Collaterally Attacking the Validity of the 2006 FCC Order Outside the Exclusive Procedures Established by the Act.

The Supreme Court granted certiorari in this case limited to the question whether the Hobbs Act's vesting of exclusive jurisdiction in the courts of appeals to determine the validity of final FCC orders means that a district court must follow the FCC's interpretation of "unsolicited advertisement." Every court of appeals to address the scope of Hobbs Act review more generally has held that it precludes challenges to covered agency actions in suits between private parties.[3]

[3] *E.g.*, *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119-21 (11th Cir. 2014); *Leyse v. Clear Channel Broad., Inc.*, 545 F. App'x 444, 459 (6th Cir. 2013), *cert. denied*, 574 U.S. 815 (2014); *Nack v. Walburg*, 715 F.3d 680, 685-87 (8th Cir. 2013), *cert. denied*, 572 U.S. 1028 (2014); *CE*

The Supreme Court determined that "the extent to which the Order binds the lower courts may depend on the resolution of two preliminary sets of questions"—whether the order at issue is interpretive or legislative, and whether defendants had a prior, adequate opportunity for review. *PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2055 (2019). Because both are questions of law that do not require factual development, a remand to the district court is unnecessary.

### A. The 2006 FCC final order is best understood as an interpretive rule.

In remanding, the Supreme Court first asked this Court to consider whether the relevant portion of the order at issue is "the equivalent of a legislative rule, which is issued by an agency pursuant to statutory authority and has the force and effect of law," or whether it is "instead the equivalent of an interpretive rule, which simply advises the public of the agency's construction of the statutes and rules which it administers." *PDR Network*, 139 S. Ct. at 2055 (quotation marks and alteration omitted). The Supreme Court suggested that the answer to that question may inform whether, and

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*Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 447-48 (7th Cir. 2010), *cert. denied*, 562 U.S. 1138 (2011); *Daniels v. Union Pac. R.R.*, 530 F.3d 936, 940-41 (D.C. Cir. 2008). *But see Gorss Motels, Inc. v. Safemark Sys., LP*, 931 F.3d 1094, 1106 (11th Cir. 2019) (Pryor, J., concurring) (disagreeing).

to what extent, the relevant portion of the 2006 FCC order is binding on the district court irrespective of whether it is subject to Hobbs Act review. *Id.*

**1.** The Hobbs Act does not distinguish between legislative and interpretive rules per se, and the Supreme Court's remand order did not suggest otherwise. As relevant to the FCC, the Hobbs Act's exclusive framework for review extends to "all final orders . . . made reviewable by section 402(a) of title 47," 28 U.S.C. § 2342(1), and the case law suggests that "final orders" may include both interpretive and legislative orders. *US West Commc'ns, Inc. v. Hamilton*, 224 F.3d 1049, 1055 (9th Cir. 2000). Section 402(a), in turn, makes reviewable "any order of the Commission," 47 U.S.C. § 402(a), except for certain licensing decisions. Accordingly, courts have in appropriate cases found final FCC orders that are interpretive in character to be subject to Hobbs Act review. *See, e.g.*, *Sorenson Commc'ns, Inc. v. FCC*, 567 F.3d 1215, 1223 (10th Cir. 2009); *Central Tex. Tel. Coop., Inc. v. FCC*, 402 F.3d 205, 213 (D.C. Cir. 2005).

Although interpretive rules may in some circumstances be subject to Hobbs Act review, the purposes of such review apply to legislative rules with particular force. A legislative rule "has the force of law, and creates new law or imposes new rights or duties." *Children's Hosp. of the King's Daughters,*

*Inc. v. Azar*, 896 F.3d 615, 620 (4th Cir. 2018); *see National Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014). "[A] rule is legislative if it 'expands the footprint of a regulation by imposing new requirements, rather than simply interpreting the legal norms Congress or the agency itself has previously created." *Id.* (alteration omitted) (quoting *Iowa League of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013)). The hallmark of a legislative rule is that it "modifies or adds to a legal norm based on the agency's own authority." *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997) (emphasis omitted).

Particularly where agency action affects parties' rights and obligations, centralized review is critical. The Hobbs Act exclusive review scheme promotes efficiency, certainty, and uniformity by providing for immediate and exclusive review in a single court of appeals. *See Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014); *CE Design, Ltd. v. Prism Bus. Media, Inc.*, 606 F.3d 443, 450 (7th Cir. 2010). These procedures also "ensure that the Attorney General has an opportunity to represent the interest of the Government whenever an order of one of the specified agencies is reviewed." *Port of Bos. Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 70 (1970). And they provide

the reviewing court with a fully developed agency record and permit input from the full range of interested parties who participated before the agency, *cf.* Fed. R. App. P. 15(c)(1). Allowing rules that have the force and effect of law to be challenged ad hoc in private proceedings over an indefinite period would undermine the established expectations of regulated parties and create substantial uncertainty.

**2.** The challenged portion of the 2006 final order is best understood as interpretive rather than legislative. Unlike legislative rules, interpretive rules do not have the force and effect of law and generally are not "accorded that weight in the adjudicatory process." *See Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015); *see Vietnam Veterans of Am. v. Secretary of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988) (collecting cases "implying that legislative rules bind the courts, while interpretive rules or policy statements do not").

"[T]he critical feature of interpretive rules is that they are 'issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.'" *Perez*, 575 U.S. at 97 (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)). Thus, "an interpretive rule is merely a clarification or explanation of an existing statute or rule" and

does not give rise to new requirements. *Children's Hosp.*, 896 F.3d at 620) (quoting *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1341 (4th Cir. 1995)); *see Jerri's Ceramic Arts, Inc. v. CPSC*, 874 F.2d 205, 207 (4th Cir. 1989). Such rules may "clarify a statutory or regulatory term, remind parties of existing statutory or regulatory duties, or . . . explain something the statute or regulation already required." *Mendoza v. Perez*, 754 F.3d 1002, 1021 (D.C. Cir. 2014) (alteration in original).

Whether a rule is legislative or interpretive is "ascertained by an examination of the provision's language, its context, and any available extrinsic evidence," *Jerri's Ceramic*, 874 F.2d at 208, including "whether the agency has explicitly invoked its general legislative authority," or "whether the agency has published the rule in the Code of Federal Regulations," *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 18 (D.C. Cir. 2019). Generally, legislative rules must go through the notice-and-comment procedures prescribed by the Administrative Procedure Act (APA) while interpretive rules need not. *See Perez*, 575 U.S. at 97.

These considerations indicate that the relevant portion of the 2006 order is best viewed as an interpretive rule. By its terms, the order

interprets the statutory definition of "unsolicited advertisement," explaining that "messages that promote goods or services even at no cost, such as free magazine subscriptions, catalogues, or free consultations or seminars, are unsolicited advertisements *under the TCPA's definition*." 21 FCC Rcd. at 3814 ¶ 52 (emphasis added). The Commission explained that "'free' publications are often part of an overall marketing campaign" and "describe the 'quality of any property, goods, or services,'" as specified by the TCPA. *Id.* (quoting 47 U.S.C. § 227(a)(5)). By explaining the meaning of the statutory term, the Commission clarified the scope of an existing obligation rather than creating a new one.

Although the FCC has express authority to implement the TCPA, including by adopting legislative rules addressing the restriction on unsolicited fax advertisements, *see* 47 U.S.C. § 227(b)(2), the Commission did not purport to exercise that authority in connection with the relevant portion of the 2006 order. The FCC exercised that authority in issuing other parts of the 2006 order, *see* 21 FCC Rcd. at 3817 ¶ 64, but the relevant paragraphs discussing unsolicited fax advertisements do not invoke the Commission's rulemaking authority, *see id.* at 3814 ¶ 52, 3817 ¶ 66. The procedures through which the pertinent portion of the order was

adopted—which did not include the full measure of notice and comment provided in connection with other parts of the order, *see infra* part B.2.b—are also consistent with the rule's characterization as interpretive rather than legislative, as is the fact that the Commission's interpretation was not codified in the Code of Federal Regulations, *see Guedes*, 920 F.3d at 18.

**3.** Whether a rule is legislative or interpretive may affect the deference to which it is entitled—an issue raised by this Court's September 6, 2019, supplemental briefing order. As the Supreme Court's remand order suggested, "[i]f the relevant portion of the 2006 Order is the equivalent of an 'interpretive rule,' it may not be binding on a district court, and a district court therefore may not be required to adhere to it." *PDR Network*, 139 S. Ct. at 2055. The question of deference would only arise if this Court first determined that, notwithstanding the exclusive procedures established by the Hobbs Act, the challenged portion of the FCC order was properly reviewable in this suit.

Legislative rules generally merit *Chevron* deference, while interpretive rules often do not. *See National Mining Ass'n*, 758 F.3d at 251. For rules not entitled to *Chevron* deference, a lesser form of deference may still be appropriate. *See United States v. Mead Corp.*, 533 U.S. 218,

227-28, 234-35 (2001) (discussing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944)). As the Supreme Court has observed, "agencies charged with applying a statute necessarily make all sorts of interpretive choices, and while not all of those choices bind judges to follow them, they certainly may influence courts facing questions the agencies have already answered." *Id.* at 227. At least some of the conditions that support judicial deference attended the relevant portion of the 2006 order, as the FCC applied its expertise to interpret a statute that Congress has charged it with implementing, and the Commission gave some form of notice and opportunity to comment.

If the Court were to review the Commission's interpretation of the statute, it would not be necessary in this case to determine whether the rule should be accorded *Chevron* deference, because the FCC's reasoning is persuasive, making *Skidmore* deference sufficient to guide the Court's interpretation. The TCPA defines "unsolicited advertisement" to include "any material advertising the commercial availability or quality of any property, goods, or services." 47 U.S.C. § 227(a)(5). And the FCC's 2006 order explains that many "messages that promote goods or services even at no cost" fit that definition because "'free' publications are often part of an

overall marketing campaign" to promote products that are commercially available and often "describe the 'quality of any property, goods, or services.'" 21 FCC Rcd. at 3814 ¶ 52 (quoting 47 U.S.C. § 227(a)(5)). A substantial degree of deference is not needed to conclude that the statutory prohibition of unsolicited faxes advertising the "availability or quality" of goods or services encompasses a fax conveying the availability of a reference volume from which defendants undisputedly seek to profit.

### B. The Hobbs Act Procedures Generally Provide a "Prior, Adequate" Opportunity for Review Within the Meaning of 5 U.S.C. § 703.

**1.** The Supreme Court also asked this Court to consider whether "PDR ha[d] a 'prior' and 'adequate' opportunity to seek judicial review of the Order." *PDR Network*, 139 S. Ct. at 2055 (quoting 5 U.S.C. § 703). The APA provides in pertinent part that, "[e]xcept to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. § 703. Section 703 thus establishes a general rule that, when a defendant's liability depends in part on the propriety of agency action, the action ordinarily can be challenged in a civil or criminal enforcement suit. The provision specifically contemplates, however, that

judicial review of agency action will be unavailable during enforcement proceedings if an "adequate" opportunity to obtain review was previously available and Congress made that avenue "exclusive."

Here, the Hobbs Act procedures afforded defendants a prior and adequate opportunity to seek judicial review. In general, the Hobbs Act provides precisely the type of "prior, adequate, and exclusive" opportunity for review that section 703 contemplates. Indeed, the APA's reference to an "adequate" opportunity for judicial review was drawn from the Supreme Court's decisions addressing the statutory precursor to the Hobbs Act. In *Yakus v. United States*, 321 U.S. 414 (1944)—decided two years before the APA was enacted—the Court held that foreclosure of judicial review in later enforcement proceedings poses no due process problem so long as litigants previously received an "adequate" opportunity to challenge the relevant agency order. *Id.* at 434, 436-37. The Court found adequate for these purposes the time-limited opportunity for review in a specified forum provided by the statute in that case. *Id.*; *see Bowles v. Willingham*, 321 U.S. 503, 516 (1944).

Section 703 reflects the concept of adequacy that the Court articulated in *Yakus*. *See* Paul R. Verkuil, *Congressional Limitations on Judicial*

*Review of Rules*, 57 Tul. L. Rev. 733, 741 n. 34 (1983); Samuel A. Bleicher, *Economic and Technical Feasibility in Clean Air Act Enforcement Against Stationary Sources*, 89 Harv. L. Rev. 316, 353 n. 205 (1975). The Attorney General's Manual on the Administrative Procedure Act (1947) (APA Manual), which the Supreme Court has often cited as a persuasive authority, *see Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004) (citing cases), explains that the APA incorporates "the legal standard which the courts . . . ha[d] already developed" regarding "the adequacy of statutory review procedures," APA Manual 98, and that section 703's statement regarding a "'prior, adequate, and exclusive'" channel of review simply "restates existing law," *id.* at 99; *see id.* at 100. The conclusion that the Hobbs Act procedures are adequate for these purposes is bolstered by the observation that Congress would not likely have prescribed "a centralized forum [for] review" but "'made the remedy optional and contemplated that [a] regulation could also be challenged by defiance.'" *United States v. Szabo*, 760 F.3d 997, 1006 (9th Cir. 2014).

**2.a.** Although the Hobbs Act does not distinguish between final legislative and interpretive rules, the "adequacy" of Hobbs Act review is particularly clear with respect to legislative rules issued after public notice

and opportunity to comment. And the consequences of disregarding the exclusivity of Hobbs Act review are particularly deleterious in that context.

Notice-and-comment rulemaking follows a three-step process. The agency must issue a general notice of proposed rulemaking, "give interested persons an opportunity to participate in the rule making through submission of written" comments, and "consider and respond to significant comments," *Perez*, 575 U.S. at 96 (quoting 5 U.S.C. § 553(b)-(c))—*i.e.*, those "comments which, if true, would require a change in the proposed rule," *Genuine Parts Co. v. EPA*, 890 F.3d 304, 313 (D.C. Cir. 2018).

These procedures are designed to inform the public of the content and purpose of a proposed rule; to provide interested persons with an opportunity to comment; and to ensure that the agency responds to significant comments in a manner that promotes reasoned decisonmaking and permits informed judicial review. *See North Carolina Growers' Ass'n, Inc. v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012). To make the process meaningful, it is crucial that an entity present its concerns to the agency so that the agency can consider their impact on the proposed rule and provide a full explanation of its position. *See Advocates for Highway & Auto Safety v. Federal Motor Carrier Safety Admin.*, 429 F.3d

1136, 1150 (D.C. Cir. 2005). If the entity is dissatisfied with the agency's response, it is incumbent on the entity to seek judicial review in the manner prescribed by the Hobbs Act.

The Hobbs Act procedures ensure that all affected persons, as well as the agency responsible for issuing and enforcing the regulation, have the opportunity to participate in the judicial proceeding, giving the reviewing court the benefit of relevant perspectives and expertise. Permitting an entity to raise its concerns for the first time in private litigation—in which the agency and other interested parties may not be involved—would largely defeat the purpose of the notice-and-comment procedures as well as those established by the Hobbs Act.

**b.** The proceedings through which the pertinent portion of the 2006 order was adopted did not receive the full measure of notice and comment that attended other portions of that order. As relevant, the FCC received a number of petitions for reconsideration or clarification of its 2003 rule addressing unsolicited advertisements of free goods or services in the context of the TCPA's restrictions on automated telephone calls, 17 FCC Rcd. at 17,478 ¶ 31. Several of those petitions asked the Commission to address the issue of advertisements for free goods or services in the adjacent

context of fax communications. As noted, these requests included petitions asking the Commission to clarify that its interpretation did not encompass faxes offering free information about pharmaceutical products to pharmacists, or those offering "specialized trade or business publications provided at no charge." *Supra* p.6 & nn. 1, 2.

The Commission provided public notice of the receipt of 55 petitions and invited comment on these filings, but the Federal Register notice did not specify the particular subject of the petitions other than to note the underlying Commission order that they concerned. *See* 68 Fed. Reg. at 53,740. Instead, the notice directed interested parties to consult the full text of the petitions for further information. *Id.* Although this notice was sufficient to prompt some parties to file comments on the various petitions, it stands in contrast to the more traditional notice-and-comment procedures followed in connection with other portions of the 2006 order.

In sum, the Hobbs Act procedures generally provide an adequate, prior opportunity to challenge an agency order regardless of whether the order is the equivalent of a legislative rule or interpretive rule. But if the Court concludes that the concept of "adequacy" under Section 703 depends on the precise notice-and-comment procedures employed by the agency, the

notice provided here was not as robust as the FCC ordinarily provides for legislative rulemaking.

**3.** Notwithstanding the less robust notice and comment in this case, it is difficult to credit defendants' assertion that they could not have availed themselves of the Hobbs Act procedures. There was ample public notice that the Commission was considering the meaning of "unsolicited advertisement" beginning in 2002 and continuing through the issuance of the 2006 order, and many other entities availed themselves of the opportunity to participate in Commission proceedings. As noted above, following the Commission's issuance of a 2003 order addressing unsolicited advertisements of free goods or services in the context of automated telephone calls, several entities filed petitions for reconsideration or clarification raising questions similar to the one presented here regarding the application of the prohibition of unsolicited fax advertisements to communications regarding free goods or services. Defendants could likewise have participated in Commission proceedings regarding the scope of the TCPA's prohibition on unsolicited fax advertisements. Their failure to do so does not evidence any deficiency in the FCC proceedings or the Hobbs Act procedures for judicial review.

Similarly unpersuasive is defendants' argument that they were unable to avail themselves of Hobbs Act review because they had no reason to believe that the 2006 order had interpreted "unsolicited advertisement" to include communications of the type at issue. This Court previously found that the order was "clear and unambiguous" in that respect, explaining that the order articulated "this simple rule: faxes that offer free goods and services are advertisements under the TCPA." *PDR Network*, 883 F.3d at 466-67. Defendants thus had ample notice that the order might affect their interests.

In the Supreme Court, defendants posited a variety of hypothetical circumstances which, in their view, cast doubt on the adequacy of Hobbs Act review. For example, they suggested that the statutory time limit requiring a party to seek direct review of a covered agency action within 60 days of its issuance would make the review provided by the Act inadequate for parties that first came into existence after that period had closed. Such conjecture casts no doubt on the general adequacy of the Hobbs Act procedures, either in general or in the specific circumstances of this case. *See Yakus*, 321 U.S. at 447 (holding that defendants could not collaterally attack a regulation

when they had not used "the procedure which was open to them and it does not appear that they have been deprived of the opportunity to do so").

Moreover, even in circumstances in which a particular challenge could not feasibly have been brought within the initial 60-day review period, potential challengers are not without recourse. If a party can show good reason for the Commission to reconsider a past ruling, it may petition the Commission to rescind, reopen, or waive its past order. *See* 47 C.F.R. § 1.2 (petitions for declaratory ruling); *id.* § 1.3 (petitions for waiver); *id.* § 1.401 (petitions for rulemaking). *See, e.g.*, *City of Peoria v. General Elec. Cablevision Corp.*, 690 F.2d 116, 121-22 (7th Cir. 1982); *United States v. Dunifer*, 219 F.3d 1004, 1008-09 (9th Cir. 2000).

### C. Construing the Hobbs Act to provide the exclusive procedures for judicial review of agency action does not raise constitutional concerns.

Prior to briefing in the Supreme Court, defendants did not argue that interpreting the Hobbs Act to provide the exclusive procedures for judicial review raises separation of powers or due process concerns. These constitutional arguments are forfeited, and they in any event lack merit.

The courts are, of course, vested with the authority and responsibility to interpret federal statutes and regulations. The Hobbs Act has never been

thought to interfere with that authority. On the contrary, a key purpose of the review scheme is to ensure that a reviewing court has the benefit of a fully developed administrative record and the participation of interested entities, including the federal agency charged with developing and applying the rule. Because the Act amply provides for judicial review of agency action, it cannot be thought to intrude on the separation of powers.

The adequacy of the Hobbs Act procedures likewise obviates any due process concerns. Due process does not require that litigants be permitted to challenge an agency order at whatever time, or in whatever forum, they choose. It instead "requires the government to provide notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (quotation marks omitted). Here, as discussed, defendants had adequate notice and a meaningful opportunity to obtain review of the 2006 order. Defendants' decision not to avail themselves of Hobbs Act review may have practical consequences, but it lacks any constitutional dimension.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This amicus brief complies with the type-volume limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,318 words, according to the count of this office's word-processing system. This brief also complies with the typeface and type-style requirements of Rules 32(a)(5) and (6) because it was prepared in CenturyExpd BT 14-point font, a proportionally spaced typeface.

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 20, 2019, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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